NORTEL NETWORKS (ASIA) LTD & ORS A

v.

SAPURA HOLDINGS SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
KN SEGARA JCA
ALIZATUL KHAIR OSMAN JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: W-02-2292-2009]
7 SEPTEMBER 2012 C

CONTRACT: *Collateral contract - Formation - Respondents induced by appellants' representation - Commercial relationship of parties regulated by oral representations - Introduction of written agreement by appellant - Non-renewal of agreement - Whether tantamount to ipso facto termination - Whether parties had joint venture relationship - Whether oral agreement superseded by written agreement - Whether oral evidence which contradicted written agreement admissible - Whether parties' rights and obligations determined by oral representation - Evidence Act 1950, ss. 91 & 92* D E

The respondents ('plaintiffs') were involved in, *inter alia*, manufacturing, marketing and distributing of telecommunication equipments. The third appellant ('third defendant') was a manufacturer of the Private Automatic Branch Exchange, commonly known as PABX System and had also incorporated the first appellant ('first defendant') to market the second appellant's ('second defendant') products in Asia. The second defendant was the international trading arm of the third defendant. The plaintiffs alleged that the then chief executive and principal officer of the second defendant and acting on behalf of the third defendant, one Ben Beneteau ('Ben'), had approached the executive chairman ('PW1') of the first plaintiff to request the plaintiffs to undertake the future sales and servicing of the PABX equipment in Malaysia. It was further alleged that various representations were made by Ben in the negotiations, which included, among others, (i) that the plaintiffs' services would be required to market the PABX System on a long term basis with provisions for automatic renewals; and (ii) that the defendants would make available to the plaintiffs all assistance required in the plaintiffs' endeavour to market the PABX System. According to the plaintiffs, until 1984, the commercial relationship between them and the defendants which commenced in 1979 proceeded without any written agreement and F G H I

was regulated *vide* representations made by Ben. In 1984, the second defendant introduced a written agreement ('Distributorship Agreement') and since then, the parties had entered into several Distributorship Agreements. However, in 1994, the defendants informed the plaintiffs that the agreement with them would not be renewed based on its evaluation of the plaintiffs' performance. In filing a suit against the defendants for damages and a declaration that the defendants had wrongly failed to renew the contract, the plaintiffs submitted, *inter alia*, (i) that a collateral agreement constituting the representations and the past conduct had come into effect and was binding on both parties; (ii) that the failure to renew the agreement was tantamount to *ipso facto* termination; (iii) notwithstanding the Distributorship Agreements, the total absence of any written agreement during the first five years of the parties' relationship and the assurance given evidenced the existence of a collateral contract; and (iv) that there was a joint venture relationship between the parties. On the other hand, the defendants argued that the oral representations, even if made, were superseded by the Distributorship Agreements and the relationship of the parties was governed by the written agreements. In the High Court, the learned Judicial Commissioner ('JC') allowed the plaintiffs' claim ruling that PW1 was induced into agreeing to be a distributor for the defendants' products as a result of Ben's oral representations. Dissatisfied with the said decision, the defendants appealed to this court.

Held (allowing appeal with costs; setting aside decision of High Court)

Per Aziah Ali JCA delivering the judgment of the court:

(1) Section 91 of the Evidence Act 1950 ('the Act') states that extrinsic evidence is not admissible to vary, add to or contradict the terms of a written agreement. In coming to the finding that there was a collateral contract, the learned JC had not sufficiently appreciated the provisions of s. 92 of the Act and the contemporaneous documentary evidence. When the agreements are clear and unambiguous, the court should not introduce or add new terms to the agreements (*Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors*; refd). (paras 13, 14 & 16)

(2) Based on s. 92 of the Act, it was not permissible for the learned JC to admit the oral evidence of PW1 which contradicted the written agreements. The agreements being contemporaneous ought to be preferred to the oral evidence

of PW1 which was given 30 years after the alleged representations. Further, the alleged oral representations were directly inconsistent with the provisions of the Distributorship Agreements. (para 14)

(3) The relationship between the parties was nothing more than one arising from a commercial transaction and in view of the entire agreement clause found in the agreements, the parties' rights and obligations must be determined as set out in the said agreements and not on any purported oral representations. (para 14)

(4) The learned JC erred in finding that there was a joint venture without having regard to the plaintiffs' obligations as provided under the Distributorship Agreement. The defendants' relationship with the plaintiffs was nothing more than a commercial transaction and not a joint venture. Further, the totality of the evidence was insufficient to show that a joint venture relationship existed between the parties. Hence, the defendants owed no fiduciary duty towards the plaintiffs. (para 16)

(5) There was sufficient evidence adduced on the plaintiffs' poor performance. The defendants had sufficient cause and were entitled to exercise their option not to renew the Distributorship Agreement which had come to an end by effluxion of time. Hence, this court was unable to agree with the JC's finding that there was an unlawful termination of the agreement. Further, in view of the non-exclusive clause in the agreements, the defendants were clearly entitled to exercise their option as to whom any further Distributorship Agreement should be granted. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden ('plaintif-plaintif') terlibat dalam, antara lain, pengeluaran, pemasaran dan pengedaran peralatan telekomunikasi. Perayu ketiga ('defendan ketiga') merupakan pengeluar "Private Automatic Branch Exchange", secara umumnya dikenali sebagai sistem PABX dan juga telah menubuhkan perayu pertama ('defendan pertama') untuk memasar produk perayu kedua ('defendan kedua') di Asia. Defendan kedua adalah cabang perdagangan antarabangsa defendan ketiga. Alegasi pihak plaintif

adalah bahawa ketua pegawai eksekutif defendan kedua pada masa itu dan bertindak bagi defendan ketiga, satu Ben Beneteau ('Ben'), telah berjumpa dengan pengurusi eksekutif ('PW1') plaintif pertama untuk meminta plaintif-plaintif menjalankan jualan masa depan dan servis peralatan PABX di Malaysia. Ianya dikatakan selanjutnya bahawa beberapa representasi telah dibuat oleh Ben dalam perundingan, termasuk, antara lain, (i) bahawa perkhidmatan plaintif-plaintif diperlukan untuk memasarkan sistem PABX bagi jangka masa panjang dengan peruntukan pembaharuan secara automatik; dan (ii) bahawa defendan-defendan akan memberi bantuan yang diperlukan kepada plaintif-plaintif bagi pemasaran sistem PABX. Menurut pihak plaintif, sehingga 1984, perhubungan perdagangan di antara mereka dan defendan-defendan yang bermula pada tahun 1979 berterusan tanpa sebarang perjanjian bertulis di antara mereka dan dikawalselia oleh representasi yang dibuat oleh Ben. Pada tahun 1984, defendan kedua telah memperkenalkan perjanjian bertulis ('Perjanjian Pengedaran') dan sejak itu, pihak-pihak telah memasuki beberapa Perjanjian Pengedaran. Walau bagaimanapun, pada tahun 1994, defendan-defendan memaklumkan pihak plaintif bahawa perjanjian dengan mereka tidak akan dibaharui berdasarkan penilaian pencapaian pihak plaintif. Dalam memfailkan tindakan ini terhadap defendan-defendan bagi ganti rugi dan deklarasi bahawa pihak defendan telah gagal membaharui kontrak, plaintif-plaintif berhujah, antara lain, (i) bahawa perjanjian kolateral berbentuk representasi dan kelakuan terdahulu telah berkuatkuasa dan mengikat kedua-dua pihak; (ii) bahawa kegagalan membaharui perjanjian adalah suatu penamatan *ipso facto*; (iii) walaupun adanya Perjanjian Pengedaran, ketiadaan sebarang perjanjian bertulis bagi tempoh lima tahun pertama perhubungan pihak-pihak dan jaminan yang diberi menunjukkan kewujudan perjanjian kolateral; dan (iv) bahawa terdapat satu perhubungan usahasama di antara pihak-pihak. Sebaliknya, defendan-defendan berhujah bahawa representasi lisan, walaupun dibuat, telah digantikan oleh Perjanjian Pengedaran dan perhubungan pihak-pihak dikawal oleh perjanjian bertulis. Di Mahkamah Tinggi, yang arif Pesuruhjaya Kehakiman ('PK') membenarkan tuntutan plaintif-plaintif dengan memutuskan bahawa PW1 telah didorong untuk bersetuju menjadi pengedar bagi produk pihak defendan berdasarkan representasi lisan oleh Ben. Tidak puas hati dengan keputusan tersebut, defendan-defendan merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 91 Akta Keterangan 1950 ('Akta') menyatakan bahawa keterangan ekstrinsik tidak boleh diterima untuk mengubah, menambah atau menyangkal terma-terma perjanjian bertulis. Dalam memutuskan bahawa terdapat satu perjanjian kolateral, yang arif PK tidak menghargai peruntukan s. 92 Akta dan keterangan dokumen semasa. Apabila perjanjian adalah nyata dan jelas, mahkamah tidak sepatutnya memperkenal atau menambah terma-terma baru ke dalam perjanjian (*Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors*; dirujuk).

(2) Berdasarkan s. 92 Akta, yang arif PK tidak boleh membenarkan keterangan lisan PW1 yang menyangkal perjanjian bertulis. Perjanjian bersifat semasa lebih diutamakan daripada keterangan lisan PW1 yang telah diberi 30 tahun selepas representasi yang dikatakan. Lagipun, representasi lisan tersebut tidaklah konsisten dengan peruntukan Perjanjian Pemasaran.

(3) Perhubungan antara pihak-pihak bukanlah suatu yang berbangkit daripada transaksi komersil dan berdasarkan keseluruhan klausa perjanjian yang dijumpai dalam perjanjian, hak dan obligasi pihak-pihak sepatutnya ditentukan berdasarkan perjanjian tersebut dan bukan atas sebarang representasi lisan.

(4) Yang arif PK khilaf dalam mendapati bahawa terdapat suatu perniagaan usahasama tanpa mengambilkira obligasi plaintif-plaintif di bawah Perjanjian Pemasaran. Perhubungan pihak-pihak bukanlah lebih daripada suatu transaksi komersil dan bukannya perniagaan usahasama. Lagipun, keseluruhan keterangan tidak mencukupi untuk menunjukkan bahawa suatu perhubungan perniagaan usahasama wujud di antara pihak-pihak. Oleh itu, defendan-defendan tidak mempunyai kewajipan fidusiari terhadap plaintif-plaintif.

(5) Terdapat keterangan mencukupi berkenaan presentasi lemah plaintif-plaintif. Pihak defendan mempunyai kausa memadai dan layak untuk melaksanakan pilihan mereka sama ada untuk membaharui Perjanjian Pemasaran yang telah sampai ke tahap pengakhiran dengan peluputan masa. Oleh itu, mahkamah ini

A tidak bersetuju dengan pendapatan PK bahawa terdapat penamatan salah perjanjian. Tambahan, berdasarkan ketiadaan klausa eksklusif dalam perjanjian, defendan-defendan layak melaksanakan pilihan mereka berkenaan siapa Perjanjian Pemasaran akan diberikan selanjutnya.

B **Case(s) referred to:**

Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1 HC ***(refd)***

Muniandy & Ors v. PP [1966] 1 LNS 110 FC ***(refd)***

C *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA* ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92

D *For the appellants - Robert Lazar (K Shanti Mogan & Sheila Lingam with him); M/s Shearn Delamore & Co*

For the respondents - Shahul Hameed Amirudin (Norliza Rasool Khan with him); M/s Zul Rafique & Partners

E *[Editor's note: For the High Court judgment, please see Sapura Holdings Sdn Bhd & Anor v. Northern Telecom (Asia) Ltd & Ors [2010] 8 CLJ 97.]*

Reported by Kumitha Abd Majid

F

JUDGMENT

Aziah Ali JCA:

[1] This is an appeal by the appellants (defendants in the court G below) against the decision of the learned Judicial Commissioner (as Her Ladyship then was) allowing the respondents' (plaintiffs in the court below) claim against the appellants for damages for unlawful and wrongful termination of agreement and a declaration that the defendants had wrongfully, unlawfully, unjustly and H unconscionably failed to renew the respondents' contract with the appellants. We had allowed the appeal and set aside the order of the High Court for the reasons we set out below. Costs of RM100,000 here and below was awarded to the appellants and the deposit was refunded. For the purpose of this judgment the I parties will be referred to as they were in the court below.

The Parties

[2] The 1st plaintiff, a holding company owning a group of companies which included the 2nd plaintiff, specialized in manufacturing, marketing, distributing, exporting, installing and servicing of telecommunications equipment. The 3rd defendant was a manufacturer of Private Automatic Branch Exchange, commonly known as 'PABX system'. The 2nd defendant was the international trading arm of the 3rd defendant. The 3rd defendant incorporated the 1st defendant to market the products of the 2nd defendant in Asia.

Plaintiffs' Case

[3] Prior to 1979 the 3rd defendant had appointed one Electroscon Sdn Bhd (Electroscon) to distribute in Malaysia the PABX system manufactured and supplied by the defendants. The plaintiffs alleged that in or about 1979 one Ben Beneteau (Beneteau), the then chief executive and principal officer of the 2nd defendant and acting on behalf of the 3rd defendant, approached the executive chairman of the 1st plaintiff (PW1) to request that the plaintiffs undertake the future sales and servicing of the 3rd defendant's PABX equipment in Malaysia. It was alleged that various representations were made by Beneteau in the negotiations. In para. 5.3 of the statement of claim the plaintiffs averred that Beneteau made the following representations:

(a) the 3rd defendant's choice of the 1st plaintiff was based on the 1st plaintiff's past and continuing performance in the telecommunication field in Malaysia, and on the in-house resources that were readily available to the 1st plaintiff;

(b) the initial marketing of the PABX System and the matters attendant thereto including a commitment to service and maintain the system would be slow and in the process, the 1st plaintiff would suffer losses;

(c) that Malaysia offered tremendous growth potential for the PABX System. The market would eventually prove to be highly profitable and the losses absorbed by the 1st plaintiff in the initial years could be reversed and the 1st plaintiff would be able to reap sizeable and substantial profits;

(d) all the defendants would make available to the plaintiffs all assistance and back-up required in the plaintiffs' endeavour to market the PABX System;

(e) all the defendants would also make available an agency to the plaintiffs in respect of the PABX System and the various other NT products;

(f) the 1st defendant and the 3rd defendant should enter into a long term commercial relationship in the telecommunication field which would be commercially beneficial to both parties;

(g) that the services of the plaintiffs would be required to market the PABX System on a long term basis with provisions for automatic renewals;

(h) that to instill confidence among the purchasers and to establish a reputation for the PABX System, the plaintiffs should hold spare parts for at least a period of five years of supply; and

(i) the plaintiffs' past record and reputation will also instill confidence amongst the prospective purchasers that the PABX System supplied was a quality product and that the same would be serviced and maintained effectively.

The plaintiffs averred that induced by the alleged representations, the 1st plaintiff took over all the rights, titles and liabilities and interests of Electroscon.

[4] According to the plaintiffs up till 1984 the commercial relationship between the plaintiffs and the defendants which commenced in 1979 proceeded without any written agreement and was regulated essentially by the representations made by Beneteau, conduct based on commercial efficacy, prudence, reasonableness and fairness. The plaintiffs contended that the resulting relationship between the 1st plaintiff and the 3rd defendant was not only of a mere principal and agent or a manufacturer and distributor but as co-venturers in the enterprise of marketing, distributing and servicing the PABX system in Malaysia.

[5] The plaintiffs averred that in 1984 the 2nd defendant introduced a written agreement (distributorship agreement) which was to be reviewed either on an annual or biennial basis. According to PW1 the reason advanced by the 2nd defendant was that it was standardising its affairs internationally and that the written agreement would not in any way infringe or contravene or breach the past agreement that prevailed between the 1st plaintiff and the 3rd defendant. Since 1984 parties had entered into several distributorship agreements.

[6] In April 1994 the defendants officially informed the plaintiffs in a meeting that the plaintiffs' agreement with the defendants would not be renewed. By letter dated 20 April 1994 the defendants gave the plaintiffs 90 days' notice that based on its evaluation of the plaintiffs' performance the defendants had decided not to renew the Distributorship Agreement for 1994.

[7] It was the plaintiffs' case that a collateral agreement constituting the representations and the past conduct had come into effect and was binding on the plaintiffs and the defendants. The plaintiffs contended that the failure to renew the agreement is nothing more nor less than terminating the defendants' contract with the plaintiffs and the non-renewal was tantamount to *ipso facto* termination. It was contended that the defendants were estopped both in law and in fact from terminating the agreement and that the termination was not only unreasonable and unfair but was also unlawful and wrongful and in breach of the collateral and other agreements. The plaintiffs claimed that the defendants were in breach of the fiduciary and other duties the defendants owed to the plaintiffs as co-venturer and as a result the plaintiffs had suffered and continued to suffer losses and damages.

[8] The plaintiffs claimed against the defendants amongst others special damages in the sum of RM21,439,000, general damages, punitive and exemplary damages and a declaration that the defendants had wrongfully, unlawfully, unjustly and unconscionably failed to renew the plaintiffs' contract with the defendants.

The Appeal

[9] Before us learned counsel for the appellants/defendants Mr Robert Lazar raised two issues as follows:

(a) what was the nature and terms of the relationship between the plaintiffs and the defendants; and

(b) whether the plaintiffs had proved the damages claimed.

[10] In essence it was submitted that the oral representations, even if made, were superseded by the subsequent written distributorship agreements and the relationship of the parties was governed by the written agreements. The said agreements contemplated fixed durations and the defendants were entitled not to renew the distributorship by reason of the plaintiffs' poor sales and service performance. The plaintiffs on the other hand

A contended that notwithstanding the distributorship agreements, the total absence of any written agreement during the first five years of the parties' relationship and the assurances given for the written contracts evidenced the existence of a collateral contract between the parties. It was submitted for the plaintiffs that but for the B representations and for the belief that the oral agreement continued to be in effect, the plaintiffs would not have entered into the agreement.

Collateral Contract

C **[11]** Notwithstanding ss. 91 and 92 of the Evidence Act 1950 raised by the defendants and despite acknowledging that the oral evidence of PW1 was made almost 30 years after the purported representations were made, the learned Judicial Commissioner accepted the testimony of PW1 and found that the oral D representations formed a collateral contract side by side to the distributorship agreement. Her Ladyship made amongst others the following findings:

(a) that PW1 was induced into agreeing to be a distributor for E the defendants' products and venture into the business of marketing and distributing telecommunication equipment as a result of the oral representations made by Mr Ben; and

(b) that PW1 believed in what Mr. Ben had promised him and F held on to that promise.

Her Ladyship gave the following reasons for accepting the evidence of PW1:

> G Considering the huge commitment and risk undertaken by PW1 in agreeing to be distributor of the Defendants' products and the straight forward answers given by PW1, I had no hesitation to say that PW1 was telling the truth.

[12] Whilst we had no issue with the finding of the learned H Judicial Commissioner regarding the credibility of PW1, we were also of the view that, in assessing his evidence, the learned Judicial Commissioner ought to heed what Chang Min Tat FJ said in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 as follows:

> I Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of

> fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. **Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case**. Plausibility should never be mistaken for veracity. (emphasis added.)

In *Muniandy & Ors v. PP* [1966] 1 LNS 110 the trial judge accepted the evidence of certain witnesses because they had remained unshaken in cross examination. Based on that evidence he convicted the appellant. The Federal Court reversed the decision. Ong Hock Thye FJ said:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

[13] Section 91 of the Evidence Act 1950 states that extrinsic evidence is not admissible to vary, add to or contradict the terms of a written agreement. Section 91 provides as follows:

> **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
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> 91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of the property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

In *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217 this court through the judgment of Sulaiman Daud JCA (as he then was) said as follows:

> The doctrine of collateral contract or agreement is recognized in this country by virtue of proviso (b) to s. 92 of the Evidence Act 1950 which allowed to be admitted in evidence any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms. Unless the additional evidence sought to be introduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add or subtract from the terms of the agreement (per Chang Min Tat FJ in *Tindok Besar Estate Sdn. Bhd v. Tinjar Co* [1979] 1 LNS 119. Such collateral contract must be viewed strictly (see *Heilbut, Symons & Co v. Buckleton* [1913] AC 30). No agreement would be safe from being re-written by one party in court of law if parole evidence which do not fall within the proviso of s.92 of the Evidence Act is admitted in evidence (see *Tindok Besar Estate Sdn Bhd*, *supra*).

Proviso (b) to s. 92 states as follows:

> **Exclusion of evidence of oral agreement**
>
> 92. When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that:
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is **not inconsistent with its terms**, may be proved, and in considering whether or not this proviso applies, **the court shall have regard to the degree of formality of the document**; (emphasis added)

[14] We find that in coming to her finding that there was a collateral contract, the learned Judicial Commissioner had not sufficiently appreciated the provisions of s. 92 of the Evidence Act 1950 and the contemporaneous documentary evidence. The alleged oral representations were directly inconsistent with the provisions of the distributorship agreements. We were of the view that based on s. 92 of the Evidence Act 1950 it was not permissible for the learned Judicial Commissioner to admit the oral evidence of PW1 which contradicts the written agreements.

Further we agreed with learned counsel for the defendants that the agreements being contemporaneous ought to be preferred to the oral evidence of PW1 which was given 30 years after the alleged representations. We were in agreement with learned counsel for the defendants that the alleged oral representations, even if made, were superseded five years later by the written distributorship agreement. We find that the testimony of PW1 under cross examination that the distributorship agreement was sent to him for his signature after his in-house lawyers had studied and vetted the same as evidence that the plaintiffs had accepted and agreed to be bound by the agreement. On the evidence we find that the relationship of the parties was nothing more than one arising from a commercial transaction and in view of the entire agreement clause found in the agreements the parties' rights and obligations must be determined as set out in the said agreements and not on any purported oral representations.

Joint Venture

[15] The plaintiffs contended that the evidence of PW1 showed that the relationship of the parties was not only that of a mere principal and agent or a manufacturer and distributor but a joint venture relationship with the plaintiffs as co-venturer. The learned Judicial Commissioner agreed that based on the conduct of the parties in their business and the surrounding circumstances of the case the relationship between the parties was more than a buyer and seller or distributor but was consistent with a joint venture where the plaintiffs controlled the venture, find new markets and maximize sales and the defendants controlled the products. The learned Judicial Commissioner referred to the events which were implemented by the plaintiffs in 1992 at the request of the defendants as an example which Her Ladyship said supported the existence of a joint venture between the parties. For the defendants it was submitted that the steps implemented by the plaintiffs were implemented because it was the plaintiffs' contractual obligation to do so as distributor responsible for marketing the defendants' PABX System including the provision of servicing and maintenance services to purchasers.

[16] The obligations of the plaintiffs were set out in the distributorship agreement in particular cl. 6. We agreed with learned counsel for the defendants that the steps implemented by the plaintiffs in 1992 were merely in compliance with their contractual obligations. We were of the view that the learned

Judicial Commissioner had seriously erred in finding that there was a joint venture without having regard to the plaintiffs' obligations as provided under the distributorship agreement. We were in agreement with the defendants that their relationship with the plaintiffs was nothing more than a commercial transaction and not a joint venture. When the agreements are clear and unambiguous (as in this case) the court should not introduce or add new terms to the agreements (*Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1). In our considered opinion the totality of the evidence was insufficient to show that a joint venture relationship existed between the parties. Thus the defendants owed no fiduciary duty towards the plaintiffs. Consequently the order for assessment of damages cannot be supported both in principle and quantum.

Termination

[17] The defendants had given the plaintiffs 90 days' notice that the distributorship agreement would not be renewed although the agreements required only 60 days' notice to be given. The reason for the non-renewal was because of the plaintiffs' poor performance. The plaintiffs contended that the termination of the distributorship agreement was unlawful. The learned Judicial Commissioner held that the defendants' conduct in terminating the distributorship agreement without just cause was unlawful and unjust to the plaintiffs.

[18] Learned counsel for the defendants submitted that the learned Judicial Commissioner erred in finding that there was unlawful termination of the agreement. Counsel contended that there was no termination but rather a non-renewal after the last agreement ended. Counsel submitted that the learned Judicial Commissioner erred in finding that the plaintiffs had met the sales target set by the defendants. It was submitted that DW2 and DW3 had given exhaustive evidence of the problems faced by the defendants in relation to the plaintiffs' poor performance. Their evidence were not challenged in cross-examination. The failure to cross-examine amounted to an acceptance of their evidence. It was submitted that by reason of the plaintiffs' poor performance the defendants had every right not to renew the distributorship.

[19] We had perused the testimonies of both DW2 and DW3 and find sufficient evidence adduced on the poor performance of the plaintiffs. DW2 testified that at a meeting held on 6 October 1993 in Singapore with the plaintiffs that he attended, the plaintiffs told the defendants that they could make a US$4 million target but the defendants' analysis showed that the plaintiffs could only make a US$2.5 million target. The defendants asked the plaintiffs to review their structure and to inform the defendants what they were going to do. The defendants made known to the plaintiffs that the defendants were unhappy about the plaintiffs' lack of improvement and lack of forward looking plan to structural change. DW3 testified that the plaintiffs failed to meet the sales target for 1992 and achieved only US$2.88 million compared to the sales target of US$3.66 million. In 1993 the plaintiffs sales performance plunged to US$1.8 million when every other distributor in the Asean region equalled if not improved their 1992 performance. On the evidence we were of the view that the defendants had sufficient cause and were entitled to exercise their option not to renew the distributorship agreement which had come to an end by effluxion of time. Hence we were unable to agree with the learned Judicial Commissioner's finding that there was an unlawful termination of the agreement. Further in view of the non-exclusive clause in the agreements we were of the view that the defendants were clearly entitled to exercise their option as to whom any further distributorship agreement should be granted.

[20] For the reasons adumbrated above we allowed the appeal with costs and set aside the decision of the High Court.